

ST 95-30

Tax Type: SALES TAX

Issue: Audit Methodologies and/or Other Computational Issues
Reasonable Cause on Application of Penalties Assessed

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

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THE DEPARTMENT OF REVENUE      )
OF THE STATE OF ILLINOIS      )   Case No.
                               )   Reg. No.
                               )   NTL No.
                               )
                               )
v.                               )
                               )   John E. White,
XXXXXXXX,                       )   Administrative Law Judge
Taxpayer.                       )
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RECOMMENDED DECISION

APPEARANCES: Attorney, appeared on Taxpayer's behalf.

SYNOPSIS: This matter arose after Taxpayer ("taxpayer") protested the Illinois Department of Revenue's ("Department's") issuance of Notice of Tax Liability No. XXXXX to taxpayer, which assessed use tax on Taxpayer's purchase of six trailers.

Pursuant to a pre-hearing order, taxpayer agreed that the issues to be determined at hearing were: (1) whether taxpayer's purchase of six trailers was complete when it obtained the trailers on or about 1984 or 1985; and (2) whether the Department's assessment of use tax, based on payments made by taxpayer on or about 3/31/89 and 6/30/90 was proper. At hearing, which was held on May 8, 1995, taxpayer presented documentary and testimonial evidence through two of its employees. I have considered the evidence adduced at that hearing, and I am including in this recommendation specific findings of fact and conclusions of law. I recommend that the NTL be revised to eliminate any assessment of use tax on the one trailer for which taxpayer filed a motor vehicle use tax return in 1989. I recommend that the NTL be finalized with regard to the other five trailers purchased by taxpayer.

FINDINGS OF FACT:

1. Taxpayer sells food and paper products to fast food restaurants. Hearing Transcript ("Tr.") p. 9.
2. Taxpayer uses motor vehicles, including trucks and trailers, to deliver the tangible personal property it sells. See Tr. pp. 9-12.
3. The trailers at issue in this matter were selected by taxpayer's transportation department. Tr. p. 12.
4. Taxpayer entered into an agreement with Taxpayer B, ("Taxpayer B"), in which Taxpayer B provided taxpayer with 100% financing for the trailers. Tr. pp. 11-14.
5. The agreement pursuant to which taxpayer acquired the trailers at issue is titled, "Equipment Lease Agreement" ("Agreement"), and is dated May 1, 1985. Taxpayer Ex. No. 5.
6. The following chart details pertinent information regarding the six trailers at issue:

Trailer nos. / Taxpayer A nos.

| | | |
|---|---|-------|
| 1 | / | XXXXX |
| 2 | / | XXXXX |
| 3 | / | XXXXX |
| 4 | / | XXXXX |
| 5 | / | XXXXX |
| 6 | / | XXXXX |

VIN

XXXXXX
XXXXXX
XXXXXX
XXXXXX
XXXXXX

Approximate date of original return / original return nos.

| | |
|------|---|
| 3/84 | / |
| 6/85 | / |
| 6/85 | / |
| 6/85 | / |
| 6/85 | / |
| 6/85 | / |

Parties identified on original tax returns & title documents

(seller / buyer)

XXXXX / Taxpayer B
XXXXX / Taxpayer B

Title assigned to TP on

5/05/89
7/23/90
7/23/90
7/23/90
7/23/90
7/23/90

Approximate date first tax return filed listing TP as purchaser

5/5/89
no record of filing
no record of filing
no record of filing
no record of filing
no record of filing

See Taxpayer Ex. No. 7; Department Ex. No. 2.1 (title and registration documents regarding trailer no. 2); Department Ex. No. 2.2 (title and registration documents regarding trailer no. 3); Department Ex. No. 2.3 (title and registration documents regarding trailer no. 4); Department Ex. No. 2.4 (title and registration documents regarding trailer no. 5); Department Ex. No. 2.5 (title and registration documents regarding trailer no. 6); Department Ex. No. 2.6 (title and registration documents regarding trailer no. 1).

7. Taxpayer took possession of trailer no. 1 before the date of the Agreement. Department Ex. No. 2.6.

8. Pursuant to paragraph 9 of the Agreement, taxpayer was required to purchase the trailers at issue. Taxpayer Ex. No. 5, 9 (as amended).

9. Paragraph 11 of the Agreement provides:

TAXES, LICENSES, FEES: Customer will, on or before the due date, pay to Lessor or directly to the proper governmental authority, any taxes, license fees, charges or costs assessed or incurred in connection with the titling, registration, lease, sale, use or operation of the Equipment leased hereunder or upon this Agreement or the payments made to Lessor from Customer hereunder, including but not limited to all sales and use taxes, license plate fees, fuel taxes, vehicle registration fees, federal highway use taxes,

personal property taxes, ad valorem taxes, excise taxes, and any taxes or fees which may be required by the business of Customer, excluding however income taxes measured solely by the net income of Lessor. Customer will maintain appropriate and complete records with respect to the information upon which such taxes, licenses, and fees are imposed and such information may be inspected by Lessor upon request. All required motor vehicle registration plates, licenses or permits will be obtained directly by Customer in the name of Lessor, except for the initial registration plates which Lessor will obtain, all at Customer's expense. Lessor will provide to Customer Powers of Attorney, other necessary authorizations and information and will cooperate with Customer in Customer's performance of the obligations of this paragraph 11. In states where sales tax is due on original purchase price such tax will be paid by Lessor and added to the capitalized value.

Taxpayer Ex. No. 5, 11 (as amended).

10. There was no evidence introduced at hearing that either Taxpayer B or taxpayer ever filed a return on which tax was measured by taxpayer's original purchase price for the trailers. Compare, e.g., Taxpayer Ex. No. 7 and Tr. p. 63 (taxpayer's witness' testimony regarding its purchase price of the trailers) with Department Ex. No. 2.1 (Use Tax receipt issued to Taxpayer B for trailer no. 2) and Department Ex. No. 2.4 (Use Tax receipt issued to Taxpayer B for trailer no. 5).

11. Consistent with the provisions of the Agreement, Taxpayer B gave taxpayer power of attorney for the following purposes:

To secure from the State of Illinois vehicle license tags and registration cards or the title certificates for vehicles owned by TAXPAYER B. Said attorney to have full power and authority to do and perform every act and thing necessary to secure the proper vehicle tags, registration cards and title certificates as aforesaid.

See Department Ex. Nos. 2.1, 2.4, Powers of Attorney.

12. Pursuant to Taxpayer B's grant of power of attorney to taxpayer, taxpayer signed applications for registration for the six trailers, which applications were filed, in 1984 and 1985, with the Illinois Secretary of State. See Department Ex. Nos. 2.1-2.6.

13. On the original applications for registration for the trailers, taxpayer's Illinois address was identified as Taxpayer B's address. See

Dept. Ex. No. 2.1-2.6, Applications for Registration.

14. On the original certificates of title for the trailers, taxpayer's Illinois address was identified as Taxpayer B's address. See Dept. Ex. No. 2.1-2.6, original Certificates of Title.

15. The original certificates of title for the six trailers were mailed to Taxpayer B's Minnesota address. Id.

16. On the applications for registration filed with the Secretary of State on Taxpayer B's behalf in 1984 and 1985, Taxpayer B was named as the purchaser and owner of the trailers. See Department Ex. Nos. 2.1-2.6, Applications for Registration.

17. Motor vehicle use tax returns were filed with the Department on Taxpayer B's behalf in 1984 and 1985 regarding the trailers at issue. See Department Exhibit Nos. 2.1-2.6 (transaction return numbers XXXXX are identified on the Applications for Registration for trailer nos. 1, 2, 3 & 4, 5, and 6, respectively).

18. On 10/3/86, the Department issued to Taxpayer B, in care of taxpayer's Illinois address, receipts for use tax payments for trailer nos. 2 and 5. See Department Ex. Nos. 2.1, 2.4, Use Tax Receipts.

19. The motor vehicle use tax returns filed in 1984 and 1985 identified purchases by Taxpayer B from the manufacturers of the trailers. See Department Ex. Nos. 2.1, 2.4, Use Tax Receipts.

20. Taxpayer B subsequently changed its name to Taxpayer B. See Department Ex. Nos. 2.1-2.6.

21. Taxpayer B assigned the title to trailer no. 1 to taxpayer on 5/5/89. See, e.g., Department Ex. No. 2.6, Assignment of Title, at 2.

22. Taxpayer completed and filed a motor vehicle use tax return in 1989, after it took title to trailer no. 1 on 5/5/89. Department Ex. No. 2.6, RUT-25.

23. On the motor vehicle use tax return and application for

registration taxpayer filed in 1989 regarding trailer no. 1, taxpayer stated that it purchased trailer no. 1 on 5/5/89. Department Ex. No. 2.6, Taxpayer's RUT-25 & Application for Registration.

24. Taxpayer B transferred titles to trailer nos. 2-6 to taxpayer on 7/23/90. See Department Ex. Nos. 2.1-2.5 (Applications for Title, Assignments of Title).

25. Taxpayer introduced no documentary evidence at hearing that it filed motor vehicle use tax returns after it took title to trailer nos. 2-6 on 7/23/90.

26. The Applications for Registration which taxpayer signed, and which were filed on Taxpayer B's behalf in 1984 and 1985, indicate that the trailers were being leased. See Department Ex. Nos. 2.1-2.6, Applications for Registration.

27. Taxpayer completed, signed, and filed applications for title regarding trailer nos. 2-6 in 1990, on which taxpayer stated that it purchased the trailers on 7/23/90. Department Ex. Nos. 2.1-2.5, Applications for Title.

28. If the Agreement were a conditional sales transaction, the amount of use tax taxpayer would have been required to pay was as follows:

Trailer nos. / Taxpayer A nos.

| | | |
|---|---|-------|
| 1 | / | XXXXX |
| 2 | / | XXXXX |
| 3 | / | XXXXX |
| 4 | / | XXXXX |
| 5 | / | XXXXX |
| 6 | / | XXXXX |

Selling price Tax Rate

| | |
|--------------|----|
| \$ 48,184.50 | 5% |
| \$ 49,432.71 | 5% |
| \$ 49,432.71 | 5% |
| \$ 49,181.60 | 5% |
| \$ 49,461.60 | 5% |
| \$ 49,401.60 | 5% |

ROT/UT on selling price

\$ 2,409.22
2,471.63
2,471.63
2,459.08
2,473.08
2,470.08

Selling price identified on UT receipts of record not available

\$ 28,749.62
not available
not available
42,539.11
not available

See Taxpayer Ex. No. 7 (column 1 figures); Tr. p. 63 (column 2 figures); Ill.Rev.Stat. ch. 120, 439.10 (1985) (column 3 tax rate); Department Ex. Nos. 2.1 & 2.4, Use Tax Receipts (column 5 figures).

29. The Department calculated the amount of use tax assessed in this matter on the residual value of the trailers, which taxpayer paid to Taxpayer B before titles to the trailers were transferred. See Department Ex. No. 1; Taxpayer Ex. Nos. 5, 6, 9.

30. The Department's Correction and/or Determination of Tax Due was prepared on 2/18/94 (see Department Ex. No. 1), and the Notice of Tax Liability based thereon was issued on June 16, 1994.1

CONCLUSIONS OF LAW:

Issue 1: Although taxpayer agreed to phrase the first issue in terms of when its purchase of the trailers was completed, what it sought to prove at hearing was that the Agreement was a conditional sale instead of a lease. Because the Agreement is a conditional sale and not a lease, taxpayer's argument proceeds, its purchase must be deemed to have been completed when it first gained possession of the trailers. See Taxpayer's Brief pp. 3-6; Tr. p. 62. Whether the Agreement was a conditional sale or a lease, and whether taxpayer's purchase of the six trailers was complete when it obtained possession of those trailers are issues best approached by first reviewing the language of the Agreement itself. See, e.g., Farm

Credit Bureau v. Whitlock, 144 Ill.2d 440, 447 (1991) (the intention of the parties to a contract must be determined from the instrument).

Paragraph 15 of the Agreement provides, in part:

GENERAL: This Agreement* is a capital lease only and Customer acquires no title or ownership rights to any Equipment until expiration of the initial 60 month term per the Schedule A for each individual item of equipment.

*This Agreement is a Capital Lease and all tax benefits including Investment Tax Credits and accelerated depreciation accrue to the benefit of the Lessee.

Taxpayer Ex. No. 5, 15 (as amended).

Taxpayer B could terminate the Agreement if taxpayer defaulted. See Taxpayer Ex. No. 5, 10. In that event, however, taxpayer was required to pay the total amount of payments called for by the Agreement, or the difference between market value of the trailer (measured by Taxpayer B's resale) and the Schedule A Depreciated Value. Taxpayer's ability to terminate the Agreement was governed by paragraph 9, which, as amended, provided:

TERMINATION: After completion of the twelfth (12th) billable month for any item of Equipment leased under this Agreement, Customer [taxpayer], if not then in default of any terms of this Agreement, may terminate the lease for any or all Equipment effective the last day of any month by giving thirty (30) days advance written notice of such intention; provided however, that Customer will purchase the Equipment so terminated. In purchasing such Equipment, Customer will pay Lessor the Schedule "A" Addendum Depreciated Value together with all outstanding lease payments and charges through 11:59 p.m. of the termination date for said Equipment. Upon receipt of such amount for each item of Equipment to be purchased, Lessor will convey said Equipment to customer as of the termination date, free and clear of all liens and encumbrances. After completion of the 60th billable month for each item of Equipment leased under this Agreement, Customer must purchase the Equipment from the Lessor at the Schedule "A" Addendum Depreciated Value.

Taxpayer Ex. No. 5, 9 (as amended). I find the language of the Agreement unambiguous. Taxpayer could only terminate a transaction commenced pursuant to the Agreement after the 12th billable month, and

then, only if it paid the scheduled residual value of the particular equipment, plus all outstanding lease payments due.

In addition to reviewing the language of the parties' Agreement, I have also taken into consideration provisions of the Illinois Use Tax Act ("UTA"), 35 ILCS 105/1 et seq., the Department's administrative rules, and applicable provisions of the Uniform Commercial Code ("UCC"), 810 ILCS 5/1-101 et seq. If read in a vacuum, the Agreement would appear to satisfy the UCC's evidentiary benchmarks as a conditional sale, in which Taxpayer B retained only a security interest² in the trailers. 810 ILCS 5/1-201(37)(1994); *In re Lerch*, 147 B.R. 455, 460 (C.D.Ill. 1992).

I will not look only to the Agreement, however, because a determination of whether a transaction is a lease or a conditional sale must be based on the facts of each particular case, with the key being the economics of the transaction. *In re Lerch*, 147 B.R. at 460. My conclusion on this first issue is significantly affected by the parties' conduct during the transactions called for by the Agreement. See 810 ILCS 5/2-208(1) (Course of Performance or Practical Construction);³ *Department of Revenue v. Jennison-Wright Corporation*, 393 Ill. 401, 408 (1946) ("there is no more convincing evidence of what the parties [to a contract] intended than to see what they did in carrying out its provisions"); *Swift Dodge v. Commissioner of Internal Revenue*, 692 F.2d 651, 652 (1982) (the characterization of a transaction for federal tax purposes is controlled by the substantive provisions of the agreement and the parties' conduct, rather than the particular terminology used in the agreement) (emphasis added).

In *Swift Dodge*, the reason the court had to decide whether a taxpayer's contracts were leases or conditional sales of vehicles was to determine whether the taxpayer was entitled to claim depreciation and investment tax credits for the vehicles. *Swift Dodge v. Commissioner of*

Internal Revenue, 692 F.2d at 651-52. In this case, the characterization of the Agreement is at issue in order to determine whether Illinois use tax was properly assessed against this taxpayer for its purchases of trailers. Although taxpayer now asserts that the Agreement was a conditional sales agreement, the documentary evidence reveals that the parties always treated the transactions -- at least when it came to identifying the economics of the transactions to the Department for use tax purposes, and to the Illinois Secretary of State for purposes of identifying the purchasers of the trailers and the holders of any security interests therein -- as ones made pursuant to a lease.

Under Illinois' use tax scheme, persons engaged in the business of leasing motor vehicles for use in this state are the taxable users of the vehicles. See *Philco Corp. v. Department of Revenue*, 40 Ill.2d 312, 239 N.E.2d 805 (1968). Those lessors are required to pay use tax based on their purchase price of vehicles. 35 ILCS 105/86; Ill. Admin. Code 130.540. If lessors of motor vehicles subsequently sell the vehicles previously used in their business to purchasers for use in Illinois, the lessor owes retailers' occupation tax ("ROT"), and the purchaser owes a corresponding amount of use tax, based on the selling price of the vehicle. See 35 ILCS 120/2c (Sale of used motor vehicle by leasing or rental business) (formerly Ill.Rev.Stat. ch. 120, 440c (1985)); 35 ILCS 105/1a (Sale of used motor vehicle by leasing or rental business) (formerly Ill.Rev.Stat. ch. 120, 439.1a (1985)). If however, the nominal lessor is not using vehicles by leasing them in Illinois, but is instead actually selling vehicles to purchasers for use in Illinois, then both the retailer and the purchaser are required to characterize the transaction as a sale -- at the beginning of the transaction -- and the purchaser is obligated to pay use tax, either directly to the Department or to the retailer, based on the selling price of the vehicle. 86 Ill. Admin. Code 130.540.

Here, both parties treated the transactions as being made pursuant to a lease by the way in which titles to the trailers were claimed and reported. Taxpayer was never identified as the owner of the trailers on the certificates of title or applications for registration filed with the Secretary of State. See Department Ex. Nos. 2.1-2.6. Instead, Taxpayer B was named as the owner of the vehicles. Had Taxpayer B been a conditional seller, and taxpayer been a conditional purchaser or mortgagor of the trailers, taxpayer should have been named as the owner, and Taxpayer B would have been named as the (or a) lienholder, on the certificates of title for the trailers. Indeed, that is the exclusive means by which security interests are created and/or perfected under the Illinois Vehicle Code ("IVC"). Ill.Rev.Stat. ch. 95«, 3-201 to 3-210 (1985); In re Keidel, 613 F.2d 172, 173 (7th Cir. 1980); In re Glenview Imports, Ltd, 27 B.R. 496, 501 (C.D.Ill. 1983); Huber Pontiac, Inc. v. Wells, 59 Ill. App. 3d 14, 17, 375 N.E.2d 149, 152 (1978). As the documentary evidence reveals, however, no security interest between Taxpayer B (as a secured party/lienholder) and taxpayer (as the owner/mortgagor or owner/conditional purchaser) was ever created or perfected as required by the IVC. See Department Ex. Nos. 2.1-2.6.

Additionally, Taxpayer B identified itself as the purchaser of the trailers, and it self-assessed use tax for its use of the trailers in Illinois, on the original motor vehicle use tax returns filed in Taxpayer B's name. See Department Ex. Nos. 2.1-2.6, original Applications for Registration, Use Tax Receipts. When applications for registration were filed naming Taxpayer B as the owner and purchaser of the trailers, those applications also indicated that the trailers were being leased. Department Ex. Nos. 2.1-2.6, original Applications for Registration. Those actions are inconsistent with taxpayer's claim that Taxpayer B sold the trailers to it in 1984 and 1985.

An officer of taxpayer signed each of the original applications for registration filed on Taxpayer B's behalf in 1984 and 1985. Department Ex. Nos. 2.1-2.6, original Applications for Registration. Additionally, the receipts for use tax paid in Taxpayer B's name were sent to taxpayer's Illinois address. Department Ex. Nos. 2.1, 2.4, Use Tax Receipt. Taxpayer, therefore, had actual knowledge that its purported ownership interest was never made known to the Secretary of State or to the Department until Taxpayer B transferred titles to the trailers in 1989 and 1990. Taxpayer must also be deemed to have knowledge that the purchase prices reported on the use tax returns filed in Taxpayer B's name were significantly less than the prices taxpayer paid for the trailers. Compare, e.g., Taxpayer Ex. No. 7 and Tr. p. 63 (taxpayer's witness confirmed that the loan amounts identified in Taxpayer Ex. No. 7 reflected taxpayer's purchase price for the trailers) with Department Ex. No. 2.1 (Use Tax receipt issued to Taxpayer B for trailer no. 2) and Department Ex. No. 2.4 (Use Tax receipt issued to Taxpayer B for trailer no. 5).

Taxpayer's acquiescence to Taxpayer B's assertion of title to and ownership of the trailers, moreover, is entirely consistent with taxpayer's explicit agreement that, absent termination or default, it would not acquire title to a trailer "until expiration of the initial 60 month term" of the lease. Taxpayer Ex. No. 5, 15 (as amended). While taxpayer agreed, in 1985, to purchase the equipment from Taxpayer B at a later date, the plain language of the Agreement provided that taxpayer would have no ownership interest in the equipment until all the payments due under the Agreement were received by Taxpayer B, and titles were transferred to taxpayer. I acknowledge that, pursuant to the Agreement, taxpayer was granted certain income tax benefits, and it agreed to undertake certain obligations, normally associated with ownership of the equipment.⁴ But as to the specific question of when the ownership or title to the equipment

passed from Taxpayer B to taxpayer, the Agreement sets forth the explicit agreement of the parties.

Finally, when taxpayer filed applications for registration or title for the trailers in 1989 and 1990, it stated on the applications that it purchased the used vehicles on either 5/5/89 or 7/23/90. See, respectively Department Ex. No. 2.6, Application for Registration (for trailer no. 1); Department Ex. Nos. 2.1-2.5, Applications for Title (for trailer nos. 2-6). Each of those applications were signed by taxpayer's representative. Taxpayer's agent's signature, in each application, appears directly under the following pre-printed language:

I/We affirm that the information provided is true and correct.

Department Ex. Nos. 2.1-2.5, Applications for Title (for trailer nos. 2-5); Department Ex. No. 2.6, Application for Registration (for trailer no. 1). Each of those applications acts as an admission by taxpayer in this matter. See, e.g., County Treasurer v. Ford Motor Co., 166 Ill. App. 3d 373, 519 N.E.2d 1010, 1014 (1st Dist. 1988) (contradictory statements of a party constitute substantive evidence against the party of the facts stated). Taxpayer purchased the vehicles on the dates titles were transferred.

In this case, taxpayer knew that Taxpayer B claimed title to and ownership of the trailers at all times prior to the transfers of title to the vehicles. It explicitly agreed that it would obtain ownership and title to the trailers only after the titles were assigned to it. It knew that Taxpayer B self-assessed use tax based on a purchase price which was less than the purchase price taxpayer was to pay for the trailers, and an agent of taxpayer stated under oath that taxpayer purchased the trailers in 1989 and 1990. I find that taxpayer's prior acts and statements estop it from now asserting that its purchase of the trailers was completed five years before the dates on which it took title to them. I conclude,

therefore, that taxpayer's purchase of the trailers was not complete when it first obtained possession of the trailers in 1984 and 1985.

Issue 2: The prima facie correctness of the Department's action in this matter was established when the Department's determination of tax due was introduced at hearing under the certification of the Director. 35 ILCS 120/5 (incorporated into the UTA by 35 ILCS 105/12). The Department's prima facie case is overcome, and the burden shifts to the Department to prove its case, when a taxpayer presents books and records and testimony which is consistent or probable in light of such documentary evidence. See *Sprague v. Johnson*, 195 Ill. App. 3d 798, 552 N.E.2d 436 (4th Dist. 1990).

The use tax assessed in this matter was based on taxpayer's residual payments to LLT for the trailers, after which LLT transferred titles to the trailers to taxpayer. Department Ex. No. 1; Department Ex. Nos. 2.1-2.6, Assignments of Title from LLT to taxpayer. The assessment, in effect, treated taxpayer's purchases of the trailers as being made after the 60-month term of the Agreement. There is no dispute that taxpayer used the trailers in Illinois after 1989 and 1990. The propriety of the Department's assessment of use tax, therefore, depends primarily on whether taxpayer ever filed motor vehicle use tax returns regarding its purchase and use of the trailers at issue.

The exhibits admitted into evidence reveal that taxpayer filed a motor vehicle use tax return regarding its 1989 purchase of trailer no. 1. See Department Ex. No. 2.6, Use Tax Return no. 70592012. Section 4 of the ROTA, provides, in part:

Except in case of a fraudulent return, or in the case of an amended return (where a notice of tax liability may be issued on or after each January 1 and July 1 for an amended return filed not more than three years prior to such January 1 or July 1, respectively), no notice of tax liability shall be issued on and after each January 1 or July 1 covering gross receipts received during any month or period of time more than 3 years prior to such January 1 or July 1, respectively.

35 ILCS 120/4 (incorporated into the UTA by 35 ILCS 105/12). The NTL in this matter was issued on June 16, 1994. Absent some showing that taxpayer's 1989 return for trailer no. 1 was fraudulent, the Department was time barred from issuing a notice of tax liability, based on a correction of that return, after 7/1/92. 35 ILCS 120/4. The tax assessed on taxpayer's purchase of trailer no. 1, therefore, cannot stand.

With respect to transactions for which no returns were filed, however, there was, at the time the NTL was issued in this matter, no statute limiting the Department's ability to make a determination of tax due. 35 ILCS 120/5 (incorporated into the UTA by 35 ILCS 105/12).⁵ Taxpayer introduced no documentary evidence that it filed motor vehicle use tax returns in 1990 regarding trailer numbers two through six. Taxpayer argued in its brief that the Illinois Secretary of State's issuance of a certificate of title and license plates for the trailers in taxpayer's name is evidence that taxpayer filed motor vehicle use tax returns for all the trailers. I will not take as conclusive evidence of a material fact at issue taxpayer's mere recitation of a statute requiring that such returns be filed before the Secretary of State issues license plates for the vehicles. The Department is not estopped from acting because of the mistakes of its own agents or employees. See *Austin Liquor Mart v. Department of Revenue*, 51 Ill.2d 1, 280 N.E.2d 437 (1972). I see no reason to believe that the possible errors of a different state agency could estop the Department from making a proper determination of tax due here.

Taxpayer's burden at hearing is to introduce documentary evidence, and testimony based thereon, supporting its claim of nontaxability. *Sprague v. Johnson*, 195 Ill. App. 3d 798, 552 N.E.2d 436 (1990). In 1990, motor vehicle use tax returns (such as the RUT-25 form filed by taxpayer regarding trailer no. 1, see Department Ex. No. 2.6) were, as they are currently, single-page, multiple-copy forms. One of the copies is to be

retained by the taxpayer filing the return. Had taxpayer completed use tax returns for trailer nos. 2-6 in 1990, it ought to have had copies to introduce as evidence at hearing. Taxpayer, however, did not introduce copies of the returns it asserts must have been filed.

The documentary evidence introduced at hearing, moreover, confirms that no motor vehicle use tax returns were filed in 1990, when taxpayer filed applications for titles to trailer nos. 2-6. In Department Ex. No. 2.6, tax transaction number MV70592012 -- which is the number printed on the motor vehicle use tax return taxpayer filed when it purchased trailer no. 1 on 5/5/89 -- is recorded on taxpayer's application for registration for trailer no. 1. See Department Ex. No. 2.6, Use Tax Return no. 70592012. Similarly, the tax transaction numbers for the returns filed on Taxpayer B's behalf in 1984 and 1985 are recorded in the appropriate boxes on Taxpayer B's applications for registration for the trailers. See Department Ex. Nos. 2.1-2.6, Applications for Registration. No tax transaction numbers, however, are recorded in the appropriate boxes on taxpayer's 1990 applications for titles to trailer nos. 2-6. See Department Ex. Nos. 2.1-2.5, Taxpayer's 1990 Applications for Title. Taxpayer has not, I conclude, shown that it filed returns for its purchases of trailer nos. two through six.

Taxpayer also argued that the Department is time barred from making a determination of tax due against taxpayer because of the returns which were filed in 1984 and 1985. Sales involving vehicles required to be titled in Illinois must be reported on a transaction-by-transaction basis. 35 ILCS 105/9 & 10 (formerly Ill. Rev.Stat., ch. 120, 439.9, 439.10 (1985)); 86 Ill. Admin. Code 130.540. When motor vehicle tax returns were filed in 1984 and 1985, the parties had the opportunity, and obligation, to define the nature of the transactions between them. The returns filed in 1984 and 1985 do not identify purchases by taxpayer from Taxpayer B; nor do they

identify purchases by taxpayer from the trailer manufacturers. Instead, they reflect Taxpayer B's purchase of the trailers.

Nor did the returns filed in 1984 and 1985 identify taxpayer's purchase price for the trailers at issue. The receipts issued and maintained by the Department regarding motor vehicle use tax return nos. XXXXX (filed for trailer no. 2) & XXXXX (filed for trailer no. 5) do not identify the purchase price taxpayer paid for the trailers. For trailer no. 2, the purchase price reported in Taxpayer B's original return was almost seven thousand dollars less than the price taxpayer paid for the same trailer. Department Ex. No. 2.1; Tr. p. 63. For trailer no. 5, the purchase price reported in Taxpayer B's original return was over twenty thousand dollars less than the price taxpayer paid for the same trailer. Department Ex. No. 2.4; Tr. p. 63. The returns filed in 1984 and 1985 do not identify purchases of the trailers by taxpayer and they do not identify taxpayer's claimed purchase price for the vehicles. Those returns are not taxpayer's returns, and they cannot inure to taxpayer's benefit in this matter.

Finally, taxpayer has asserted that it paid tax to Taxpayer B for the trailers. The problem with taxpayer's argument here, however, and even if the Agreement's provision allocating to taxpayer the burden of making "sales and use tax" payments (see Taxpayer Ex. No. 5, 11) were sufficient to show that taxpayer, in fact, made such payments, is that taxpayer's payments to Taxpayer B do not translate into taxpayer's payment of use tax based on taxpayer's use -- and taxpayer's purchase price -- of the trailers. Again, Taxpayer B paid use tax to the Department; it did not pay retailers' occupation tax based on the selling price of the trailers to taxpayer. The tax payments taxpayer claims it made to Taxpayer B would have, therefore, merely reimbursed Taxpayer B for the use tax Taxpayer B self-assessed for its use of the vehicles.

In five of the six transactions at issue, taxpayer has failed to show that it filed a return in which it reported its purchase of the trailers at issue for use in Illinois. Taxpayer has failed to show that it was not required to file returns when it purchased them, and it has failed to show that it previously paid use tax based on its use of those trailers in Illinois. Taxpayer, I conclude, has not overcome the prima facie case of the Department for those transactions. Therefore, I recommend that the Director revise the NTL to eliminate any assessment on taxpayer's purchase of trailer no. 1 on 5/5/89, for which it filed a return. I recommend that the Director finalize the NTL as issued regarding the assessment of use tax on taxpayer's 7/23/90 purchases of trailer nos. two through six.

Administrative Law Judge

Date Issued

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1. I take official notice of this fact.
 2. A "security interest" is defined by 1-201(37) of the UCC, which section also outlines a test for determining whether a transaction is a lease or a security interest. Under the terms of this Agreement, the consideration taxpayer was to pay to Taxpayer B for the trailers was not subject to termination by taxpayer, and taxpayer was bound to become the owner of the goods. See Taxpayer Ex. No. 5, 9, 15; In re Lerch, 147 B.R. at 461.
 3. Section 2-208(1) provides:

Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

810 ILCS 5/2-208(1).
 4. The Agreement's provisions which allocate to taxpayer the responsibilities to insure the trailers, to pay operating and maintenance expenses, and to pay state taxes for the trailers are terms typically found in net leases, and are not sufficient for me to ignore the fact that the parties continued to treat the Agreement -- at least for use tax purposes -- as a lease. See In re Lerch, 147 B.R. at 461 (quoting with approval In re Marhoefer Packing Co., Inc., 674 F.2d 1139, 1146 (7th Cir. 1982) ("Costs such as taxes, insurance and repairs are necessarily borne by one party or the other. They reflect less the true character of the transaction than the strength of the

parties' bargaining positions.")).

5. In P.A. 88-660, the legislature amended section 12 of the UTA, which amendment made section 5 of the ROTA applicable to the UTA except, "that the time limitation provisions on the issuance of notices of tax liability shall run from the date when the tax is due rather than from the date when gross receipts are received and except that in the case of a failure to file a return required by this Act, no notice of tax liability shall be issued on and after each July 1 and January 1 covering tax due with that return during any month or period more than six years before that July 1 or January 1, respectively". 35 ILCS 105/12 (as amended by P.A. 88-660, eff. September 16, 1994).